

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

BROCADE COMMUNICATIONS SYSTEMS, )  
INC., a Delaware corporation, and FOUNDRY )  
NETWORKS, LLC, a Delaware limited liability )  
company, )

Plaintiffs, )

v. )

A10 NETWORKS, INC., a California )  
corporation, LEE CHEN, an individual, )  
RAJKUMAR JALAN, an individual, RON )  
SZETO, an individual, LIANG HAN, an )  
individual, STEVEN HWANG, an individual, )  
and DAVID CHEUNG, an individual, )

Defendants. )

Case No.: C 10-3428 PSG

**ORDER GRANTING BROCADE'S  
MOTION FOR RECONSIDERATION  
AND DENYING A10'S MOTION FOR  
SUMMARY JUDGMENT**

**(Re: Docket No. 578)**

Before reassignment of this case to the undersigned, Judge Koh granted summary judgment to Defendant A10, Inc. ("A10") on Plaintiff Brocade's ("Brocade") copyright claim pertaining to automation test code.<sup>1</sup> Brocade now moves for reconsideration of that order.<sup>2</sup> Although Judge Koh heard argument on Brocade's motion, the parties still disputed whether she had indeed granted Brocade leave to bring its motion. To resolve any ambiguity in the record, the undersigned granted such leave, and gave A10 the opportunity to file a written response.<sup>3</sup> A10 has now responded,<sup>4</sup>

<sup>1</sup> See Docket No. 571 (Order Granting-In-Part and Denying-In-Part A10's Mot. for Summ. J.) at 32.

<sup>2</sup> See Docket No. 578 (Brocade's Mot. for Leave to File Mot. for Recons.).

<sup>3</sup> See generally Docket No. 635 (July 3, 2012 Pretrial Conf. Tr.).

<sup>4</sup> See Docket No. 631 (A10's Opp. to Brocade's Mot. for Leave to File Mot. for Recons.).

1 allowing the court to turn to the merits of Brocade's request. Having considered the parties'  
2 arguments, and independently studied the record, the court GRANTS Brocade's motion and  
3 DENIES A10's summary judgment motion as to Brocade's automation test code copyright claim.

#### 4 I. DISCUSSION

5 The thrust of Brocade's request is straightforward: Brocade argues that it is entitled to  
6 relief under Civ. L.R. 7-9(b) both for procedural and substantive reasons.

7 According to Brocade, while the court's summary judgment order considered and rejected  
8 its work-for-hire theory of ownership of the disputed code, it did not address Brocade's alternative  
9 assignment theory. Brocade allows that it did not extensively address the assignment theory in its  
10 summary judgment opposition, and even apologizes for its failure to provide precise citations to the  
11 record on the subject, but emphasizes the challenge it faced in providing a thorough response to  
12 A10's "prove-it-up" motion on the multitude of issues and claims in just twenty-five pages.

13 On the merits, Brocade argues that the employment contract signed by the code's author,  
14 Zhenwu He, clearly assigns all right, title, and interest in the code to Brocade, which employed Mr.  
15 Zhenwu in 2007-08 even as he "moonlighted" by writing code for A10. Brocade further highlights  
16 that this assignment clause operates independently of the "work-for-hire" clause in that same  
17 section of the contract, leaving ownership of the code with Brocade even under the court's work-  
18 for-hire analysis.

19 A10 responds first by emphasizing the court's work-for-hire ruling as the law of the case.  
20 A10 then argues that this ruling resolves all questions of A10's rights in the disputed code. Even if  
21 this were not so, A10 argues, the assignment provision upon which Brocade relies limits  
22 assignment of "Proprietary Information" such as source code to source code "of the Company."  
23 A10 urges that this leads right back to the work-for-hire ruling, which makes clear that the source  
24 code is not "of the Company," but of Mr. Zhenwu. A10 also notes Brocade's failure to present any  
25 copyright registration for the code, and the practical effects of introducing new issues and evidence  
26 into an already overstuffed trial.

The court reads the contract, or at least the provisions in dispute, as establishing a garden-variety arrangement between employer and software developer.<sup>5</sup> Certain rights of authorship are provided in one section. Certain rights of ownership are provided in another. Paragraph 3(a) provides the former: to the extent certain conditions are met, Brocade is deemed the author under the work-for-hire doctrine. Paragraph 3(c) provides the latter: for all other code created during Mr. Zhenwu's employment, Mr. Zhenwu may be the author, but ownership is assigned to Brocade.

In addition to conflating authorship with ownership, the fundamental flaw with A10's argument is that the assignment clause transfers ownership of "Inventions," not "Proprietary Information," rendering its claim that source code included within "Proprietary Information" must be "of the Company" irrelevant. Under Paragraph 1, "Inventions" includes source code regardless of whether that code is "of the Company," such that it further qualifies as "Proprietary Information."

## II. CONCLUSION

Under these circumstances, the court agrees with Brocade that a Rule 56 dismissal of its copyright claim pertaining to automation test code would reflect a manifest failure under Civ. L.R. 7-9(b). To avoid this result, summary judgment on this claim must instead be DENIED.

By this ruling the court does not suggest that Brocade necessarily may proceed with its claim at the upcoming trial. Brocade's failure to register any copyright in the disputed code, as well as the implications for the scope of evidence and testimony at trial, suggests that the better course may be to dismiss the claim without prejudice. The court invites arguments at Monday's pretrial conference on how best to proceed in light of this order.

**IT IS SO ORDERED.**

Dated: July 8, 2012

  
PAUL S. GREWAL  
United States Magistrate Judge

<sup>5</sup> See Docket No. 541 (Decl. of Elizabeth McBride in Supp. of Brocade's Opp. to A10's Mot. for Summ. J.) at Ex. 75.